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# **In the Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 443

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR  
TO THE ALIEN PROPERTY CUSTODIAN

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## **MEMORANDUM FOR THE RESPONDENT**

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### **OPINIONS BELOW**

The opinion of the Court of Appeals for the Second Circuit (R. 29) is reported at 169 F. 2d 932. The District Court wrote no opinion.

### **JURISDICTION**

The judgment of the Court of Appeals was rendered August 5, 1948 (R. 35). On November 5, 1948, the time within which a petition for a writ of certiorari might be filed was extended by Mr. Justice Jackson to December 3, 1948, "providing the statutory time has not already expired" (R. 37). The petition for a writ of certiorari was filed on December 2, 1948. The

jurisdiction of this Court is founded upon Section 1254 of Title 28 of the United States Code.

#### QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari was filed within the time permitted by statute.

2. Whether a bank, asserting a claim against an enemy depositor, may raise such claim as a defense to a suit under Section 17 of the Trading With the Enemy Act, in which the Alien Property Custodian seeks to enforce his demand for possession of a sum determined by him to be owing to the enemy depositor by the bank.

#### STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 11-17.

#### STATEMENT

On February 1, 1946, the Custodian,<sup>1</sup> having determined that the Deutsche Reichsbank was a national of an enemy country and that "that certain debt or other obligation owing to Deutsche Reichs-

<sup>1</sup> By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this memorandum the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

bank, by Manufacturers Trust Company" was "property within the United States \* \* \* payable or deliverable to" the Reichsbank, vested such property in himself (Vesting Order No. 5791, February 1, 1946, 11 F. R. 3005; Exhibit B to Petition, R. 11, 12). On January 30, 1947, the Custodian served a turnover directive on the Manufacturers Trust Company (hereinafter sometimes referred to as "the Bank"). In that directive he determined that at the time this vesting order was issued the Bank owed the Deutsche Reichsbank \$25,581.49 and that the sum of \$25,581.49 was property in the control of the Bank which had been vested in the Custodian, and directed that this sum be forthwith turned over to him (Exhibit D to Petition, R. 14-16).

The Bank refused to comply, and on October 29, 1947, the Custodian instituted the instant proceeding, petitioning the District Court for the Southern District of New York for an order directing compliance (R. 4). The answer of the Bank was in substance a plea that the Deutsche Reichsbank had no credit balance as of the date of the vesting order, because the Reichsbank was "an instrumentality and part of the German Government" and the German Government in turn had guaranteed payment of the debts of various German banks to the Manufacturers Trust Company, which debts in the aggregate exceeded the

amount owed by the Bank to the Reichsbank (R. 19, 21).

The District Court ordered the Bank to pay the sum demanded plus interest at six percent from the date of service of the turnover directive (R. 23). The Court of Appeals modified the order by striking the award of interest and affirmed the order as so modified (R. 29-36). The Custodian has filed a petition for certiorari to review the interest question. *Clark v. Manufacturers Trust Co.*, No. 386, this Term.

#### DISCUSSION

I. Mr. Justice Jackson's order of November 5, 1948 (R. 37), extending to December 3, 1948, the petitioner's time in which to file a petition for certiorari, was entered more than ninety days, but less than three months, after the entry of judgment in the Court of Appeals. The extension was expressly conditioned on the proviso that the statutory time had not already expired. Section 350 of Title 28 of the United States Code formerly required that a petition for writ of certiorari to this Court be filed within three months from the date of entry of the final judgment of the court below. Section 2101 (c) of the new Judicial Code, enacted on June 25, 1948, with an effective date of September 1, 1948, altered the time period for filing such a petition to ninety days. Consequently, the question arises whether the applicable time period is that in effect at

the date of the final judgment (three months), or that in effect at the date of the entry of the extension order (ninety days).

So far as we are aware, this Court has not yet expressly passed on this question. Although in *Wizman v. United States*, No. 263, this Term, the Court granted a petition for writ of certiorari which was filed more than ninety days, but less than three months, after the entry of the final order below, the point was not raised. In *Mulcahy v. New York, N. H. & H. R. R.*, No. 316, this Term, respondents argued that the petition should be dismissed because filed after the expiration of ninety days, although within three months, after the judgment below. The Court denied certiorari, however, without indicating whether it regarded the petition as out of time.

II. In upholding the Custodian's right to an order directing immediate payment of the sum demanded in the turnover directive, the Court of Appeals stated that:

Technically, a set-off at law is a money demand independent of and unconnected with the plaintiff's cause of action. *Otto v. Lincoln Savings Bank*, 268 App. Div. 400, 402, aff'd 294 N. Y. 798. Hence the assertion by the Bank of a right of set-off is not a denial of the Reichsbank's claim for the amount of its deposit. Consequently, we believe that, in harmony with the principle that an admitted debt owed to an enemy

must be paid over, the Custodian was entitled to recovery \* \* \*. (R. 32.)

We do not believe that this ground of decision presents any question which warrants review by this Court. It is merely a determination of the nature of a bank's right of set-off at common law; moreover, the decision was carefully limited to the effect to be given such a right when it is asserted as a defense to a possessory suit by the Alien Property Custodian under the Trading With the Enemy Act (R. 32). Insofar as the decision involves a question of New York law, the petitioner has shown no sufficient reason for this Court to review a decision of local law by judges presumed to be familiar with that law.<sup>2</sup> Insofar as the decision involves the construction of Section 17 of the Trading With the Enemy Act, there is no conflict, and there is no occasion for further review.

III. The Government, however, argued in the Court of Appeals a broader ground, which the court did not adopt. The Government's argu-

<sup>2</sup> The petitioner also contends that it had a possessory lien, within the scope of Section 8 (a) of the Act (40 Stat. 418, 50 U. S. C. App., § 8 (a)), on the credit balance of its depositor, the Reichsbank (R. 33). It is unnecessary to consider the effect of such a lien, had one existed, for the Court's holding that "the right of set-off is not technically a lien, and certainly not a lien in property of an enemy," (R. 33) is amply supported by the authorities cited in the opinion and plainly does not warrant further review.



ment was based on the unambiguous language of Section 7 (c) of the Act (40 Stat. 416, as amended, 40 Stat. 1020, 50 U. S. C. App. § 7 (c)), which provides in pertinent part that: "If the President shall so require any money \* \* \* owing \* \* \* to \* \* \* an enemy \* \* \* which the President \* \* \* shall determine is so owing \* \* \* shall be \* \* \* paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; \* \* \*."

The effect of this provision in such a situation as that here presented has never specifically been determined by this Court, although several of its decisions emphasize the fundamental proposition, which we believe should be controlling in the instant case, that "for the purposes of immediate possession the determination of the Enemy Property Custodian is conclusive, whether right or wrong," so that his suit to enforce a demand for possession of property which he determines to be owned by or owing to an enemy is intended to be equivalent to a "taking with the strong hand." E. g., *Central Trust Co. v. Garvan*, 254 U. S. 554, 566, 568-9; *Stoehr v. Wallace*, 255 U. S. 239; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Silesian-American Corp. v. Clark*, 332 U. S. 469. These cases involved property which the Custodian determined to be owned by, rather than owed to, enemies, but nothing in the language or legislative history of the Act, or in common sense, justifies an inference that Congress intended to



distinguish between the two types of property. Opinions of the lower federal courts on the precise point are not however, entirely consistent. Compare the holdings in *Camp v. Miller*, 286 Fed. 525 (C. A. 5) and *Clark v. E. J. Lavino & Co.*, 72 F. Supp. 497 (E. D. Pa.) with the dicta in the instant case (R. 31, 32) and in *Simon v. Miller*, 298 Fed. 520 (S. D. N. Y.).

This broader question, namely, whether debts stand on a different footing from other types of property owned by the alien enemy, is one of great importance in the administration of the Trading With the Enemy Act. The Court of Appeals said, *obiter dictum*, that: "If the putative debtor denies the existence of any debt whatever, we should hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount of it conclusive in a proceeding under § 17" (R. 32).

The vesting of debts owed to enemies is an important aspect of the Custodian's program for the vesting of enemy property, and bank deposits constitute a very numerous and important class of such debts. See *Annual Report, Office of Alien Property, Fiscal Year Ending June 30, 1947*, p. 76. The power summarily to reduce such assets to possession is as important to the efficient administration of the Act as the power summarily

to reduce to possession property found to be owned by an enemy, and is no more likely to be abused. The decision below, to the extent that it may cast doubt on the Custodian's summary powers, will hamper him in the exercise of his statutory functions. Persons owing money to an enemy, who desire to retain as long as possible the possession and use of the sum in question, may, in reliance on the decision below, devise colorable grounds upon which to dispute the correctness of the Custodian's administrative determination and deny the existence of the debt. As was said by Judge Learned Hand in *Kahn v. Garvan*, 263 Fed. 909, 916 (S. D. N. Y.), "To entangle this power in incidental litigations would be substantially to deny its value, which depends upon its speedy and absolute exercise \* \* \*"

The Government accordingly believes that, should this Court grant the Government's petition for a writ of certiorari to review the refusal of the Court of Appeals to allow interest in the instant case (*Clark v. Manufacturers Trust Co.*, No. 386, this Term), it would be appropriate at the same time for this Court to review the broad question of the Custodian's power, under Section 7 (c) of the Trading With the Enemy Act, to require payment to himself of a sum which he determines to be owing to an enemy, leaving the

putative debtor, if he denies the indebtedness, to the remedy provided by Section 9 (a) of the Act.<sup>2</sup>

### CONCLUSION

If the Court should grant the Government's petition for a writ of certiorari in No. 386, the Government would not object to the granting of the present petition also, if timely, for the purpose of reviewing the broad question of the Custodian's power to obtain summary possession of a debt which he has determined to be owing to an enemy. Otherwise, this petition should be denied.

Respectfully submitted,

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JANUARY 1949.

<sup>2</sup> The Court of Appeals said, by way of dictum, that "the Bank must have recourse to § 9 to litigate its asserted right of set-off." (R. 32.) This dictum is difficult to reconcile with the ground of decision adopted by the court, for, if the set-off (assuming it to exist) is "a money demand independent of and unconnected with" (R. 32) the Reichsbank's claim for the amount of its deposit, petitioner would appear to be simply an unsecured creditor of the Reichsbank, in which case its sole remedy against the Custodian would be that provided by Section 34 of the Trading With the Enemy Act. 60 Stat. 925, 50 U. S. C. App., § 34.

## APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-31):

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes: \* \* \* and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision. \* \* \*

SEC. 7 [as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020]: \* \* \*

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; \* \* \*

SEC. 8. (a) [40 Stat. 418] Any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage,

pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

**SEC. 9. (a)** [as amended by the Act of March 4, 1925, c. 285, Sec. 1, 42 Stat. 1511] Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided, That* no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right,



title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 17. [40 Stat. 425] The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary"

\*     \*     \*     \*

SEC. 34. (i) [as added by 60 Stat. 925] The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed

to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.